

**United States Department of Labor
Employees' Compensation Appeals Board**

P.E., Appellant)	
)	
and)	Docket No. 13-177
)	Issued: November 4, 2013
DEPARTMENT OF THE AIR FORCE, AIR)	
FORCE MATERIEL COMMAND, ROBINS)	
AIR FORCE BASE, GA, Employer)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 31, 2012 appellant filed a timely appeal from the October 16, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant received a \$6,289.56 overpayment of compensation; and (2) whether OWCP abused its discretion by refusing to waive recovery of the overpayment.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

OWCP accepted that on January 19, 2007 appellant, then a 63-year-old aircraft mechanic, sustained multiple injuries when he slipped and fell on a freshly-waxed ramp floor. These injuries included a back contusion, lumbar strain, aggravation of lumbar degenerative disc disease, left lumbar radiculopathy, lumbago, cervical spondylosis without myelopathy, exostosis, intervertebral disc disorder with myelopathy, herniated lumbar disc at L5-S1, cervical osteophyte at C3-4 and sprain of right upper arm and shoulder. Appellant received wage-loss compensation and medical benefits in connection with this injury.

On November 2, 2010 appellant received a schedule award for a 15 percent permanent impairment of his left arm, a 21 percent permanent impairment of his right arm, an 18 percent permanent impairment of his left leg and an 18 percent permanent impairment of his right leg. The award ran for 216 weeks from October 24, 2010 to December 13, 2014.

Appellant's wage-loss compensation was ended effective October 24, 2010 when he began receiving his schedule award. The record contains documents showing that, despite appellant's election to be under the Federal Employees Health Benefits (FEHB) system, no FEHB insurance premiums were made from the schedule award payments. On December 3, 2010 appellant received the remainder of his schedule award as a lump sum when a check was issued in the amount of \$143,811.95.² Documents further show that OWCP failed to deduct FEHB insurance premiums through January 14, 2012 and the amount of the insurance premiums that were not deducted between October 24, 2010 and January 14, 2012 totaled \$6,289.56.

In a March 28, 2012 notice, OWCP advised appellant of its preliminary determination that he received a \$6,289.56 overpayment of compensation when FEHB insurance premiums were not deducted for the period November 24, 2010 to January 14, 2012. It also made a preliminary determination that he was not at fault in the creation of the overpayment. OWCP advised appellant that he could submit evidence challenging the fact, amount or finding of fault and request waiver of the overpayment. It informed him that he could submit additional evidence in writing or at a prerecoupment hearing, but that a prerecoupment hearing must be requested within 30 days of the date of the written notice of overpayment. OWCP requested that appellant complete and return an enclosed financial information questionnaire (Form OWCP-20) within 30 days even if he was not requesting waiver of the overpayment.

Appellant requested a hearing with an OWCP hearing representative regarding the overpayment. Prior to the hearing, he submitted a Form OWCP-20, which he completed on April 2, 2012. Appellant reported his monthly income as \$1,748.00 from social security benefits. He listed \$1,883.80 in monthly expenses, including \$102.35 for property taxes, \$300.00 for food, \$587.00 for utilities, \$246.45 for other miscellaneous expenses and \$646.00 for payments to Farmers State Bank with respect to a loan. Regarding his assets, appellant noted that he had \$3.00 cash on hand and \$1.72 in his checking account. He indicated that he did not

² The check covered the period November 21, 2010 to December 13, 2014.

have savings account monies, stocks, bonds or “value of other personal property and other funds.”³

Appellant also submitted a number of financial documents concerning his monthly income and monthly expenses. A letter from the Social Security Administration showed that he received \$1,748.00 in income each month and bill statements showed that he had monthly obligations of \$106.46 for automobile insurance and \$102.35 for property tax. Documentation further reveals that, beginning May 15, 2011, appellant made monthly loan payments of \$648.00 to Farmers State Bank and that monthly bills from Northwestern Energy between January and March 2012 ranged from \$247.00 to \$394.00.⁴

During the July 16, 2012 hearing with an OWCP hearing representative, appellant testified that he understood how the \$6,289.56 overpayment occurred, but he requested waiver of recovery of the overpayment because he was not at fault in its creation. He asserted that he did not have the money to repay the overpayment, noting that his only income was \$1,748.00 per month from social security benefits. Appellant’s wife testified that the \$587.00 in utilities listed on the Form OWCP-20 completed on April 2, 2012 included monthly expenses for electricity, water, telephone and cable, but did not include the monthly expense of about \$100.00 for propane gas. She indicated that the \$246.45 listed for other miscellaneous expenses was on the low side because it did not include figures for expenses such as medical bills not covered by insurance.

In a September 11, 2012 letter to OWCP regarding his life insurance policy, appellant indicated that his wife received \$780.00 in Social Security Administration benefits each month.⁵

In an October 16, 2012 decision, the hearing representative determined that appellant received a \$6,289.56 overpayment of compensation. She further found that he was not at fault in the creation of the overpayment, but that the overpayment was not subject to waiver. The hearing representative discussed 20 C.F.R. § 10.438 (regarding submission of financial information in overpayment cases) and found that appellant did not submit sufficient financial information with supporting evidence. She indicated that appellant received a lump-sum payment for his schedule award in the amount of \$143,811.95, but that no information was provided regarding those funds and whether any of the funds were still available.

³ Appellant indicated “does not apply in my case” in response to the question, “Since you were notified of the overpayment, have you transferred by loan, gift, sale, etc., any property?”

⁴ Several submitted documents were mostly illegible, including those ostensibly concerning providers of propane and communications services.

⁵ In an August 3, 2012 letter, appellant’s wife made additional comments regarding income and expenses for her and appellant’s household, noting an obligation of about \$529.00 per month for unspecified insurance premiums and a \$1,325.00 debt to Blue Cross for prescriptions. She indicated that in July 2012 she started receiving \$780.00 per month in Social Security Administration benefits.

LEGAL PRECEDENT -- ISSUE 1

An employee entitled to disability compensation may continue his or her health benefits under the FEHB program. The regulations of the Office of Personnel Management (OPM), which administers the FEHB program, provides guidelines for the registration, enrollment and continuation of enrollment for federal employees. In this connection, 5 C.F.R. § 890.502(b)(1) provides:

“An employee or annuitant is responsible for payment of the employee’s share of the cost of enrollment for every pay period during which the enrollment continues. In each pay period for which health benefits withholdings or direct premium payments are not made but during which the enrollment of an employee or annuitant continues, he or she incurs an indebtedness due to the United States in the amount of the proper employee withholding required for that pay period.”⁶

In addition 5 C.F.R. § 890.502(d) provides:

“An agency that withholds less than or none of the proper health benefits contributions from an individual’s pay, annuity or compensation must submit an amount equal to the sum of the uncollected deductions and any applicable agency contributions required under section 8906 of the title, 5 United States Code, to OPM for deposit in the Employees’ Health Benefits Fund.”⁷

Thus, under applicable OPM regulations, the employee or annuitant is responsible for payment of the employee’s share of the cost of enrollment.⁸ An agency that withholds less than the proper health benefits contribution must submit an amount equal to the sum of the uncollected deductions.⁹ The Board has recognized that, when an under withholding of health insurance premiums is discovered, the entire amount is deemed an overpayment of compensation because OWCP must pay the full premium to OPM when the error is discovered.¹⁰ Section 8129(a) of FECA provides that where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which the individual is entitled.¹¹

ANALYSIS -- ISSUE 1

The Board finds that appellant received a \$6,289.56 overpayment of compensation. In the present case, the record contains documents showing that appellant elected FEHB coverage,

⁶ 5 C.F.R. § 890.502(b)(1).

⁷ *Id.* at § 890.502(d).

⁸ *Supra* note 6.

⁹ *Supra* note 7.

¹⁰ *See Marie D. Sinnett*, 40 ECAB 1009 (1989); *John E. Rowland*, 39 ECAB 1377 (1988); 5 C.F.R. § 890.502.

¹¹ 5 U.S.C. § 8129(a).

but no FEHB insurance premiums were made beginning October 24, 2010, the date that his schedule award began to run.¹² Documents further show that FEHB insurance premiums were not deducted through January 14, 2012 and the amount of the insurance premiums that were not deducted between October 24, 2010 and January 14, 2012 totaled \$6,289.56. Therefore, OWCP properly determined that appellant received a \$6,289.56 overpayment.

LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.¹³ These statutory guidelines are found in section 8129(b) of FECA which states: "Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."¹⁴ When a claimant is found to be without fault in the matter of the overpayment, then, in accordance with section 8129(b), OWCP may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of FECA nor be against equity and good conscience.

Section 10.438 of OWCP's regulations provide:

"(a) The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the FECA or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.

"(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver, and no further request for waiver shall be considered until the requested information is furnished."¹⁵

ANALYSIS -- ISSUE 2

OWCP properly determined that appellant did not establish entitlement to waiver of recovery of the \$6,289.56 overpayment of compensation under the relevant standards. It found that appellant was not at fault in the creation of the \$6,289.56 overpayment.¹⁶ However, citing

¹² See *supra* notes 6 through 11. On December 3, 2010 appellant received the remainder of his schedule award as a lump sum when he was issued a check in the amount \$143,811.95.

¹³ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

¹⁴ 5 U.S.C. § 8129(b).

¹⁵ 20 C.F.R. § 10.438.

¹⁶ If OWCP finds a claimant to be without fault in the matter of an overpayment, then, in accordance with section 8129(b) of FECA, OWCP may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of FECA nor be against equity and good conscience. See *supra* note 13.

20 C.F.R. § 10.438 in her October 16, 2012 decision,¹⁷ OWCP's hearing representative denied his request for waiver of recovery of the overpayment by finding that he was not entitled to such waiver because he had not provided adequate documentation of his finances.

The Board finds that appellant did not provide sufficient financial information within the appropriate time period to show that he was entitled to waiver of the \$6,289.56 overpayment and OWCP's hearing representative properly exercised her discretion to deny waiver of recovery of the overpayment. Appellant submitted a number of financial documents concerning his monthly income and expenses, but these documents did not fully document the income and expenses which were listed on the Form OWCP-20 he completed on April 2, 2012 and discussed in a July 16, 2012 hearing with the hearing representative. For example, appellant did not submit documents supporting his claimed monthly expenses of \$300.00 for food and only provided documents supporting a portion of the \$687.00 claimed for utilities (comprised of \$587.00 for electricity, water, telephone and cable and \$100.00 for propane). It was suggested that the \$246.45 appellant listed for other miscellaneous expenses included unreimbursed medical expenses, but he did not provide a detailed listing of miscellaneous expenses or submit documents supporting the claimed expenses in this category.¹⁸ Moreover, it should be noted that appellant received the remainder of his schedule award as a lump sum of \$143,811.95 and that asset was not adequately documented.¹⁹

For these reasons, appellant failed to provide adequate information regarding monthly income, monthly expenses and assets and, under Section 10.438 of its regulations, OWCP properly denied his request for waiver of recovery of the \$6,289.56 overpayment of compensation.

CONCLUSION

The Board finds that appellant received a \$6,289.56 overpayment of compensation. The Board further finds that OWCP did not abuse its discretion by refusing to waive recovery of the overpayment.

¹⁷ See *supra* note 15.

¹⁸ In an August 3, 2012 letter, appellant's wife noted an obligation of about \$529.00 per month for unspecified insurance premiums and a \$1,325.00 debt to Blue Cross for prescriptions. However, no documentation was submitted to support these ostensible expenses.

¹⁹ In addition, it does not appear that appellant fully reported his income on the Form OWCP-20 he completed on April 2, 2012. The form required appellant to list his spouse's income, but he did not list spousal income and there is some indication in the record that his wife had income from the Social Security Administration. Appellant provided additional financial information after OWCP's October 16, 2012 decision, but the Board cannot consider such evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the October 16, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 4, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board